

FINDINGS OF FACT, CONCLUSIONS AND ORDER

Rochester Area Builders, Inc.,
Respondent.

The above-entitled matter came on for an evidentiary hearing on October 18, 2004, before a panel of the following judges: Kathleen D. Sheehy (presiding judge), Barbara L. Neilson, and Cheryl LeClair-Sommer. The hearing record closed at the conclusion of the hearing on October 18, 2004.

Lyle Thomas Lemke (Complainant), 620 20th Street NE, Rochester, MN 55906, appeared for himself without counsel.

Peter J. Coyle, Esq., Larkin Hoffman Daly & Lindgren, 7900 Xerxes Avenue South, Suite 1500, Bloomington, MN 55431, and Michael J. Quinn, Esq., Suite 201, 400 South Broadway, Rochester, MN 55904, appeared for the Rochester Area Builders, Inc. (Respondent).

Pursuant to Minn. Stat. § 211B.36, subd. 5, this is the final decision in this case. Under Minn. Stat. § 211B.36, subd. 5, a party aggrieved by this decision may seek judicial review as provided in Minn. Stat. §§ 14.63 to 14.69.

Did Rochester Area Builders violate Minn. Stat. § 211B.15 by placing on its website an advertisement for a political candidate and a link to the candidate's website?

3. The panel concludes that the Respondent violated Minn. Stat. § 211B.15, subd.

Based upon the record and proceedings herein, the undersigned panel of Administrative Law Judges makes the following:

FINDINGS OF FACT

1. The Respondent is a Minnesota nonprofit corporation whose members are businesses involved in the construction industry. Its purpose is to aid in the growth of member businesses through participation, advocacy, education, and community involvement.^[1] It is an affiliate of the State of Minnesota Builders Association and the National Builders Association.

2. The Respondent has 159 builder/developer members and 374 associate members. Each member pays annual dues in the amount of \$440, of which \$140 is sent to the National Builders Association and \$170 is sent to the State of Minnesota Builders Association. Some percentage of the funds forwarded to the state and national organizations is earmarked for the political action committees of those organizations. The Respondent has also accepted contributions to a building fund for the organization.^[2]

3. The Respondent's revenues come from annual dues and profits from events such as the annual home show, Spring and Fall Showcase of Homes, golf events, and advertising.^[3]

4. Denny Hanson is an employee of Kruse Lumber, which in turn is one of the Respondent's members. Mr. Hanson is the contact person for Kruse Lumber in its dealings with the Respondent.^[4] Mr. Hanson is also an elected member of the Rochester City Council; he is seeking election to the post of Council President. John Hunziker, the incumbent Council President, is Mr. Hanson's opponent in the coming election.

5. The Respondent maintains a website that contains a directory of members. A staff person is responsible for setting up links between the Respondent's website and those of its members as the members develop their own websites. The links are provided free of charge.^[5]

6. On July 26, 2004, the staff person responsible for setting up the links put an advertisement for Denny Hanson on the home page of the Respondent's website.^[6] The advertisement reads "Elect Denny Hanson City Council President," and it contains a link to Mr. Hanson's campaign website at www.denny2004.com.^[7] The advertisement contains an image of the skyline of the City of Rochester, which is identical to the logo on Mr. Hanson's website. The wording "Elect Denny Hanson City Council President" was added to the image on Respondent's website and does not appear to be taken directly from Mr. Hanson's website.

7. There is no evidence that Mr. Hanson or anyone associated with his campaign asked the Respondent's staff person to post the advertisement or set up the link to his website. Mr. Hanson's campaign did not pay for the advertisement.^[8]

8. The only other advertisement on the Respondent's home page was for the Fall Showcase of Homes. Aquila is identified as a co-sponsor of that event, and there is a link to Aquila's website.

9. Lyle Lemke is a member of Mr. Hunziker's campaign committee. In mid-September 2004, the day before the primary election, Mr. Lemke became aware of the advertisement and link on the Respondent's website. He did not contact the Respondent about it, but decided to wait until after the primary to file a complaint.^[9]

10. In the primary election on September 14, 2004, Mr. Hunziker received 2,522 votes (50.99%) and Mr. Hanson received 2,217 votes (44.82%).^[10]

11. In August and September of 2004, there were 69,469 hits on the Respondent's website, and 1,161 hits on the link between the Respondent's website and Mr. Hanson's campaign website. This represents 1.67% of the total hits on the Respondent's website during that period.

12. On October 1, 2004, Mr. Lemke filed a complaint with the Office of Administrative Hearings, alleging that the Respondent had violated the prohibition on corporate contributions contained in Minn. Stat. § 211B.15 by placing the advertisement and link on its website.

13. On October 1, 2004, the Respondent removed the advertisement and link from its website after being advised of the complaint by the Office of Administrative Hearings.^[11]

Based upon the foregoing Findings of Fact, the undersigned panel of Administrative Law Judges makes the following:

CONCLUSIONS

1. The panel is authorized to consider this matter pursuant to Minn. Stat. § 211B.35.

2. The burden of proving the allegations made in a complaint is on the complainant. The standard of proof in this case is proof by a preponderance of the evidence.^[12]

3. The Fair Campaign Practices Act provides that "corporation" is defined to include nonprofit corporations that carry out activities in Minnesota.^[13]

4. Pursuant to Minn. Stat. § 211B.15, subd. 2, a corporation may not make a contribution or offer or agree to make a contribution, directly or indirectly, of any money, property, free service of its officers, employees, or members, or thing of monetary value to a major political party, organization, committee, or individual to promote or defeat the candidacy of an individual for election to political office.^[14] A "contribution" includes an expenditure to promote or defeat a candidate that is made with the authorization or expressed or implied consent of, or in cooperation or in concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate.^[15]

5. The Respondent did not violate Minn. Stat. § 211B.15, subd. 2, because there is no evidence that the contribution was made with the consent of, in cooperation with, or at the request of a candidate or candidate's committee.

6. Pursuant to Minn. Stat. § 211B.15, subd. 3, "[a] corporation may not make an independent expenditure or offer or agree to make an independent expenditure to promote or defeat the candidacy of an individual for . . . election . . . to a political office." An "independent expenditure" means "an expenditure that is *not* made with the authorization or expressed or implied consent of, or in cooperation or concert with, or at the request or suggestion of, a candidate or committee established to support or oppose a candidate."^[16]

7. In providing a free advertisement and link to a candidate's campaign website on the homepage of its website, the Respondent violated Minn. Stat. § 211B.15, subd. 3.

8. Pursuant to Minn. Stat. § 211B.15, subd. 15, the prohibitions in this section do not apply to a nonprofit corporation that:

- (1) is not organized or operating for the principal purpose of conducting a business;
- (2) has no shareholders or other persons affiliated so as to have a claim on its assets or earnings; and
- (3) was not established by a business corporation or a labor union and has a policy not to accept significant contributions from those entities.^[17]

9. As the party claiming entitlement to an exemption in the statute, the Respondent has the burden of proving the exemption is applicable.^[18]

10. The Respondent is organized for the purpose of promoting the business interests of its members. It has accepted contributions from business corporations in the form of dues and contributions to a building fund for the organization. The Respondent is not entitled to the exemption provided in Minn. Stat. § 211B.15, subd. 15.

11. Pursuant to Minn. Stat. § 211B.35, subd. 2, the panel may impose a civil penalty of up to \$5,000 for any violation of chapter 211B.

Based on the record herein, and for the reasons stated in the following Memorandum, the panel of Administrative Law Judges makes the following:

ORDER

IT IS HEREBY ORDERED:

That the Respondent pay a civil penalty of \$500 by November 22, 2004, for violation of Minn. Stat. § 211B.15, subd. 3. The check should be made payable to "Treasurer, State of Minnesota" and sent to the Office of Administrative Hearings, 100 Washington Avenue South, Suite 1700, Minneapolis, MN 55401.

Dated this 21st day of October 2004.

/s/ Kathleen D. Sheehy

KATHLEEN D. SHEEHY
Administrative Law Judge

/s/ Barbara L. Neilson

BARBARA L. NEILSON
Administrative Law Judge

/s/ Cheryl LeClair-Sommer

CHERYL LECLAIR-SOMMER
Administrative Law Judge

MEMORANDUM

There is no dispute about the basic facts in this case. The Respondent's executive director testified that a staff person put the advertisement and link on the website because Mr. Hanson was known to be associated with a member business and because the Respondent sets up links for all member businesses that operate websites. The advertisement and link set up for Mr. Hanson, however, was different in character (for example, there was no reference to his business activities or his employer, only to his political campaign) and was displayed more prominently than links to other member businesses. Nonetheless, there is no evidence in the record to suggest that it was more than the action of an over-eager staff member anxious to promote the interests of the membership.

The main issue here is whether the Respondent is entitled to the safe harbor exemption contained in Minn. Stat. § 211B.15, subd. 15. The Respondent's purpose is to promote the interests of its member business corporations, and it accepts contributions from these entities. The Respondent accordingly has failed to demonstrate that it is exempt from the prohibition on corporate contributions or expenditures.^[19]

With regard to the formulation of a penalty, the Complainant stated at the hearing that he was more interested in an acknowledgement of the Respondent's violation than a financial penalty. In the interests of deterring future violations, and given the cost of this proceeding, the panel concludes that some financial penalty is required. The Administrative Procedure Act, although not directly applicable to this proceeding, provides useful guidance in developing appropriate factors. It provides that if a statute

or rule gives an agency discretion over the amount of a fine, the agency must take into account the following factors: the willfulness of the violation; the gravity of the violation; the history of past violations; the number of violations; the economic benefit gained by the person by allowing or committing the violation; and other factors as justice may require. There are other factors applicable to subsequent violations.^[20]

This was not a willful violation, in the sense that the Respondent knowingly disregarded the law. A violation of the ban on corporate political contributions is, however, one of the more potentially serious violations of Chapter 211B; if prosecuted criminally, a corporation could be fined up to \$40,000, and a convicted domestic corporation might be dissolved as well as fined.^[21] In mitigation of the gravity of the complaint, however, is the fact that the Respondent immediately removed the advertisement and link from its website upon receiving notice of filing of the complaint. There is no history of past violations, the violation was a single one, and the Respondent did not gain economically by committing the violation. After considering these factors, the panel concludes a fine in the amount of \$500 is appropriate.

K.D.S., B.L.N., C.L.S.

Reported: Tape recorded (one tape)

^[1] Ex. 2 ¶ 5.

^[2] Ex. 2 ¶ 4; Testimony of Sandra Friend.

^[3] Ex. 2 ¶ 6.

^[4] Testimony of Sandra Friend.

^[5] *Id.*

^[6] *Id.*

^[7] Ex. 1.

^[8] Testimony of Sandra Friend.

^[9] Testimony of Lyle Lemke.

^[10] Testimony in Probable Cause Hearing.

^[11] Testimony of Sandra Friend.

^[12] Minn. Stat. § 211B.32, subd. 4.

^[13] Minn. Stat. § 211B.15, subd. 1.

^[14] *See id.*, subd. 2.

^[15] *Id.*

^[16] Minn. Stat. § 211B.15, subd. 3 (emphasis added).

^[17] Minn. Stat. § 211B.15, subd. 15.

^[18] *See, e.g., Sprint Spectrum v. Commissioner of Revenue*, 676 N.W.2d 656 (Minn. 2004) (the party seeking an exemption has the burden of proof to establish entitlement to the exemption).

^[19] In his Order Finding Probable Cause, Judge Beck concluded, based on *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), that application of the prohibition against corporate contributions to the Respondent is constitutionally permissible. The panel agrees. *See also Federal Election Comm'n v. Beaumont*, ___ U.S. ___, 123 S. Ct. 2200 (2003).

^[20] Minn. Stat. § 14.045, subd. 3(a), (b).

^[21] Minn. Stat. § 211B.15, subd. 7.